

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 IN RE: VALSARTAN, LOSARTAN, CIVIL ACTION NUMBER:
4 and IRBESARTAN PRODUCTS 1:19-md-02875-RMB-SAK
5 LIABILITY LITIGATION Case Management Conference
6 via Teams videoconferencing

7
8 Mitchell H. Cohen Building & U.S. Courthouse
9 4th and Cooper Streets
10 Camden, New Jersey 08101
11 Tuesday, October 22, 2024
12 Commencing at 1:00 p.m.

13 **B E F O R E:** THE HONORABLE THOMAS I. VANASKIE (RET.),
14 SPECIAL MASTER

15 **A P P E A R A N C E S:** (via Teams videoconferencing)

16 HONIK LLC
17 BY: RUBEN HONIK, ESQUIRE
18 1515 Market Street, Suite 1100
19 Philadelphia, Pennsylvania 19102
20 Co-Lead Counsel for MDL Plaintiffs

21 MAZIE SLATER KATZ & FREEMAN, LLC
22 BY: ADAM M. SLATER, ESQUIRE
23 103 Eisenhower Parkway, Suite 207
24 Roseland, New Jersey 07068
25 Co-Lead Counsel for MDL Plaintiffs

26 KANNER & WHITELEY, LLC
27 BY: CONLEE S. WHITELEY, ESQUIRE
28 701 Camp Street
29 New Orleans, Louisiana 70130
30 Co-Lead Class Counsel for Third-Party Payor Economic Loss

31 John J. Kurz, Official Court Reporter
32 John_Kurz@njdc.uscourts.gov
33 (856) 576-7094

34 Proceedings recorded by mechanical stenography; transcript
35 produced by computer-aided transcription.

A P P E A R A N C E S: (Continued)

NIGH GOLDENBERG RASO & VAUGHN, PLLC
BY: DANIEL A. NIGH, ESQUIRE
C. BRETT VAUGHN, ESQUIRE
14 Ridge Square NW, Third Floor
Washington, D.C. 20016
Co-Lead Class Counsel for Third-Party Payor Economic Loss

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
BY: JESSICA DAVIDSON, ESQUIRE
One Manhattan West, Suites 42-128
New York, New York 10001
Counsel for Defendants Zhejiang Huahai Pharmaceutical Co.,
Ltd., Huahai U.S., Inc., Princeton Pharmaceutical, Inc., and
Solco Healthcare U.S., LLC (collectively ZHP)

KIRKLAND & ELLIS LLP
BY: ALEXIA R. BRANCATO, ESQUIRE
601 Lexington Avenue
New York, New York 10022
Counsel for Defendants Torrent Pharma, Inc. and
Torrent Pharmaceuticals Ltd. (collectively Torrent)

PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI LLP
BY: FRANK STOY, ESQUIRE
JASON M. REEFER, ESQUIRE
One Oxford Centre, 38th Floor
Pittsburgh, Pennsylvania 15219
Counsel for Defendant Mylan Pharmaceuticals, Inc.

GREENBERG TRAUIG LLP
BY: VICTORIA DAVIS LOCKARD, ESQUIRE
STEVEN M. HARKINS, ESQUIRE
3333 Piedmont Road, NE, Suite 2500
Atlanta, Georgia 30305
Counsel For Defendants Teva Pharmaceutical Industries Ltd.,
Teva Pharmaceuticals USA, Inc., Actavis LLC, Actavis Pharma,
Inc. (collectively Teva)

GREENBERG TRAUIG LLP
BY: GREGORY E. OSTFELD, ESQUIRE
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
Counsel For Defendants Teva Pharmaceutical Industries Ltd.,
Teva Pharmaceuticals USA, Inc., Actavis LLC, Actavis Pharma,
Inc. (collectively Teva)

(Appearances continued onto next page)

A P P E A R A N C E S: (Continued)

CROWELL & MORING LLP
BY: ANDREW KAPLAN, ESQUIRE
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Counsel for Defendant Cardinal Health

BARNES & THORNBURG, LLP
BY: KARA KAPKE, ESQUIRE
11 South Meridian Street
Indianapolis, IN 46204
Counsel for Retailer Defendants and CVS Pharmacy, Inc., and
Walmart, Walgreens

FALKENBERG IVES LLP
BY: KIRSTIN B. IVES, ESQUIRE
230 W Monroe Street, Suite 2220
Chicago, Illinois 60606
Counsel for Defendant Humana

NORTON ROSE FULBRIGHT US LLP
BY: D'LESLI DAVIS, ESQUIRE
2200 Ross Avenue
Suite 3600
Dallas, Texas 75201
Counsel for Defendant Mckesson Corp.

HUSCH BLACKWELL LLP
BY: MATTHEW KNEPPER, ESQUIRE
8001 Forsyth Boulevard, Suite 1500
St. Louis, Missouri 63105
Counsel for Defendants Express Scripts, Inc.

Also present:

Larry MacStravic, The Courtroom Deputy

Loretta Smith, Esquire, Judicial Law Clerk to the Honorable
Robert B. Kugler (Ret.)

Rosemarie Bogdan, Esquire, Plaintiffs

Michelle Grant

1 (PROCEEDINGS held via Teams videoconferencing before
2 the Honorable Thomas I. Vanaskie (Ret.), Special Master, at
3 1:00 p.m. as follows:)

4 THE COURT: All right. I see it's 1:00. Who will be
5 addressing the issues on the plaintiffs' part today?

6 You're still muted, Daniel.

7 MR. NIGH: Thank you, Your Honor. I'll be addressing
8 some of them, Your Honor.

9 THE COURT: All right.

10 MR. NIGH: And then Mr. Slater and then we have some
11 others that are addressing them as well.

12 THE COURT: Okay. All right.

13 MR. NIGH: Adam says that it's forcing him to update
14 Teams.

15 THE COURT: Okay. We'll wait for Adam, yeah.

16 MR. NIGH: Okay.

17 THE COURT: Will there be one spokesperson for the
18 defense or multiple?

19 MS. DAVIDSON: Sorry. I think I was on mute. I
20 think there will be multiple. I think both Victoria and I will
21 be addressing different matters.

22 THE COURT: Okay. Very well. Thank you.

23 (Pause.)

24 MR. NIGH: I see that Adam is in the room. I'm not
25 sure if it's -- if it is --

1 THE COURT: Is Teams updated yet, Adam? Talk when
2 you hear -- when you can.

3 MR. NIGH: Well, he says the whole thing is resetting
4 for him right now.

5 THE COURT: All right. Let's give it a few minutes
6 then.

7 MR. NIGH: Okay.

8 (Pause.)

9 MR. NIGH: Adam asked me to go ahead and start since
10 I'm handling the first issues.

11 THE COURT: All right. Then we shall.

12 MR. NIGH: Very well.

13 THE COURT: All right. Thank you. We're on the
14 record now. Now is the time that's been set for a case
15 management conference to discuss the process of getting
16 bellwether personal injury cases to trial. And so I appreciate
17 counsel responding comprehensively to the letter order that was
18 set out that identified topics I thought we should cover today.
19 I'll be happy to address any other topics that you would like.
20 But my hope is that at the end of the day, I'll be able to have
21 the outlines and then be able to prepare an order that sets
22 forth the next few steps in this matter up to bellwether
23 trials, trials of bellwether plaintiffs, personal injury cases.

24 I know the plaintiff has made some suggestion about
25 economic loss class action perhaps being able to proceed, and

1 I'd like to talk about that as well, but the focus will be on
2 the bellwether personal injury plaintiffs.

3 And I wanted to start with the general question, and
4 if you feel you can't answer this question, but my -- I don't
5 know who now joined, but somebody did.

6 But how soon you think -- I'll ask first of the
7 plaintiffs and then of the defendants -- you will be ready for
8 a personal injury bellwether trial?

9 MR. NIGH: Your Honor, I believe that based on the
10 proposal that we've set forward, that we would be prepared to
11 have a trial go forward late spring.

12 THE COURT: Late spring, you mean like May?

13 MR. NIGH: April or May, yes.

14 THE COURT: April, May. All right.

15 All right. Let's hear from the defense now, too.

16 MS. DAVIDSON: Well, Your Honor, I think we need to
17 take a step back because we need to work these cases up for
18 trial. We need to identify experts, depose those experts. We
19 need expert reports. There's no specific-cause expert reports
20 in these cases. I think it's a pipe dream that this can be
21 ready in the spring. I think with very aggressive work-up, we
22 can be ready in the fall. But a lot of this -- I think the
23 date of the first trial is also contingent on a lot of other
24 issues that I think we need to discuss in terms of trial pool
25 work-up. And, you know, this being a bellwether system, right,

1 it doesn't, from our perspective, make sense just to pluck one
2 case.

3 I think what we envision is having a -- which is what
4 is typically done in MDL proceedings -- we envision following
5 that general approach, which would be a smaller bellwether pool
6 from the 28 cases, have all those cases worked up for *Daubert*
7 and for summary judgment and to make them trial ready so that
8 we actually are getting information, right?

9 The purpose of the bellwether process is to get as
10 much information as possible. And I don't know if this is the
11 right time to talk about it, but having -- we looked -- we took
12 a look at plaintiffs' proposal last night and had some ideas
13 for a compromised approach that would enable us to have a trial
14 I think October, October 1.

15 THE COURT: Okay.

16 MS. DAVIDSON: And if you'd like, I don't want to put
17 the cart ahead of the horse, but I could explain to you sort of
18 our thinking and what we are proposing as a compromised
19 approach that would enable us to be trial ready October 1 while
20 also getting real information about the bellwether pool and not
21 just sort of one outlier case. If you'd like me to proceed
22 with that now or if you would like to hear that later.

23 THE COURT: Yeah. I would like you to proceed with
24 that, and then we'll hear from the plaintiffs.

25 MS. DAVIDSON: Okay. So basically, Your Honor, we

1 were proposing a randomized approach, and plaintiffs proposed a
2 liver cancer trial followed by a multi-plaintiff colon cancer
3 trial. And we took a look at it and tried to think about how
4 to go forward. And our understanding of the 28 trial pool,
5 Your Honor, is that there is one case -- and Gaston Roberts I
6 believe is the name -- that has a primary liver cancer. And so
7 we would be agreeable to have that Gaston Roberts case as a
8 first trial, as plaintiffs' choice, with the following caveats:

9 Number one, we think there needs to also be, at the
10 same time, six cases randomly selected from these 28 that are
11 worked up for trial so that we have general and specific cause
12 understood for multiple types of cancers, right?

13 Because the purpose of a bellwether process, as I
14 understand it, is to get a sense of the range of potential
15 values and, you know, what cases -- to get the most information
16 about the widest range of cases, let's put it that way, right?
17 That's the goal of the bellwether process.

18 So what we would propose is at the same time that the
19 Gaston Roberts case is worked up for an October 1 trial, the
20 parties would also work up six cases randomly selected from
21 this bellwether pool, they would all be, along with the Gaston
22 Roberts case, they would all be worked up with causation
23 experts, prepared for *Daubert* and summary judgment, so we get
24 the most information about the widest range of cases. And then
25 because plaintiffs have chosen the first case, we would --

1 defendants would be able to choose a second trial to take
2 place, say, early January 2026, three months later, of a
3 single-plaintiff case from that pool of six that were worked
4 up. To the extent cases remain post summary judgment, post
5 *Daubert*, we would see what remains in that pool and select a
6 case for a second trial, a single-plaintiff trial.

7 So this way plaintiffs would get their preference of
8 having the first trial be the liver -- the one liver cancer
9 case in this pool, and we would at the same time be getting
10 that broader range of information and understanding about the
11 relative values of cases so that we are doing the most to
12 advance this MDL.

13 MR. NIGH: Your Honor, can I respond?

14 THE COURT: Yes. Yes, please, Daniel.

15 MR. NIGH: So first off, there are numerous -- the
16 idea of randomization is oftentimes how you get to the first
17 initial pool of cases. That's what most MDLs have done at this
18 stage. We didn't do it that way. We had a different selection
19 process. We're past the time of, you know, case law that's
20 been cited as to why randomization is helpful.

21 Now what we have here is we've got competing
22 proposals, randomization versus what we have shown, picking
23 based on specific factors that would allow the cases that go
24 first to trial to be more representative of the overall pool of
25 cases.

1 Because the problem with Jessica's proposal is that
2 it's possible that, for example, the randomization pulls a
3 lymphoma case or it's possible that it picks an esophageal
4 case, esophageal cancer case, and I'm going to explain why
5 that's important. Because to the extent that a lymphoma case
6 is tried, I don't think that's going to be very representative
7 of the pool cases. The reason for that is there's less than
8 3 percent of the cases in this MDL are lymphoma cases.
9 Esophageal, less than 4 percent of the cases in this MDL are
10 esophageal cases. So using this randomized pick to somehow
11 work up the cases in this fashion I think is counterproductive.
12 That's part of the reason why defendants' proposal will take so
13 long to get to trial.

14 Under my proposal, the reason it gets to trial
15 quicker is we're focused on the ZHP API defendants. We've
16 already done most of the work-up on those. When we talk
17 about -- I do agree that there needs to be case-specific expert
18 reports that need to be done, but that's why we're staging it
19 to where we're doing it per cancer type. Because depending on
20 the cancer, the specific causation expert reports are going to
21 be very specific to that cancer type.

22 You know, here the question is not did valsartan
23 cause cancer generally. It's does valsartan cause an increased
24 risk or is it capable of causing colorectal cancer or liver
25 cancer? And depending on the type of cancer changes the

1 epidemiological studies that you're relying upon. It changes
2 even the type of experts that you're utilizing.

3 So that's why, you know, for example, obviously we
4 didn't get past the stage in the MDL for *Zantac*, but in
5 California state court in *Zantac*, Delaware state court,
6 Pennsylvania state court, they all proposed a bellwether
7 process that was per the cancer type. They have cancers go
8 forward first, not this randomization and then you work up
9 everything in some hodgepodge. If you actually stage them,
10 you're going to find that what you're doing is much more
11 representative of the pool of cases.

12 So, for example, we'd be trying a liver cancer case
13 first, because almost 20 percent of the cases in this
14 litigation are liver cancer cases. Then we proposed a
15 multi-plaintiff trial to capture more plaintiffs because more
16 than half the pool of bellwether cases are colorectal cancer
17 cases, and approximately in the litigation 35 percent of the
18 cases are colorectal cancer cases.

19 So between those first two cases, you're guaranteed
20 that, in terms of cancer type, you would have more than half
21 the cases in the nation would be representative -- their cancer
22 type would be representative from those first two trials.

23 And also we think that those first two trials should
24 be limited to the API ZHP Defendants because we've done --
25 we've done most of the work-up for the liability expert

1 reports.

2 Once you start adding in this randomization and you
3 bring in, you know, Aurobindo and you bring in Mylan, well, now
4 there's a lot of work. We have to come back. We've got to go
5 back. We haven't done the liability expert reports on those.
6 I'm not saying we put them completely to the side. I think
7 that that work-up can happen concurrently for a fall trial, or
8 a winter trial. But the first two trials would be ZHP API-only
9 defendants.

10 THE COURT: All right.

11 MS. DAVIDSON: Your Honor.

12 THE COURT: Go ahead, Jessica.

13 MS. DAVIDSON: May I briefly respond?

14 THE COURT: Yeah.

15 MS. DAVIDSON: I think we need to ask a question as
16 to whether the purpose of the bellwether process is to learn as
17 much as we can about the case pool or whether the purpose of
18 the bellwether trial is for plaintiffs to try to game it to
19 maximize their likelihood of getting verdicts.

20 We all know the reason they want a multi-plaintiff
21 colorectal cancer case is because the epi on colorectal cancer
22 is extraordinarily weak, and so plaintiffs want to have a
23 multi-plaintiff trial to try to improve their chance of
24 success. They want to have a liver trial first because they
25 think that will inure to their benefit.

1 What I'm proposing is something that won't inure to
2 any party's benefit. It will inure to the benefit of advancing
3 this litigation and understanding what this pool is.

4 If plaintiffs don't think that they want to try
5 esophageal cancer cases and lymphoma cases, those cases should
6 be dismissed. But the whole purpose and the reason courts --
7 MDL courts want to have a pool worked up and not just one case,
8 you know, plucked out that plaintiffs think oh, maybe we can
9 win this one, is because what is our goal here? If our goal
10 here is to advance this MDL proceeding, we need information.
11 We need information. And one randomly picked case by
12 plaintiffs that they think -- maybe this case they think they
13 have a better chance of winning doesn't give us the information
14 we need about the pool more generally.

15 So what I'm proposing is that we actually work up a
16 small group of cases. This is what's done in every other MDL
17 I've been involved in. You work up a small group of cases.
18 All of those cases will go to Judge Bumb for *Daubert* and
19 summary judgment. So we can see what do we have here and
20 what's the value of these cases and hopefully be able to
21 finally, after all these years, move this MDL forward in a
22 productive way that can get us closer to resolving some of
23 this.

24 Victoria looks like she wants to say something as
25 well.

1 THE COURT: We'll hear from Victoria.

2 MS. DAVIDSON: You're on mute, Victoria.

3 MS. LOCKARD: Yeah. I was not about to say anything,
4 but I'm happy to address this.

5 MS. DAVIDSON: Oh.

6 MS. LOCKARD: The one thing I did make a note to
7 comment on is with respect to the multi-plaintiff trials, Your
8 Honor. I mean, at this point, you know, absolutely we would
9 request, if plaintiffs intend to proceed that way, that they
10 file a motion under Rule 42 and that the parties be allowed to
11 brief that. Because it should be obvious from our papers that
12 the defendants as a whole oppose joint plaintiff trials for
13 numerous reasons.

14 And so certainly I don't think we're at the point
15 today where that should be an issue. But we would ask to have
16 plaintiffs, if they intend to do that, they need to follow the
17 rules, they need to file their motion, and we would have an
18 opportunity to respond to it.

19 THE COURT: Thank you.

20 MR. NIGH: Your Honor, right now we're talking about
21 strategy, so we wouldn't necessarily need to file that motion
22 if the Court doesn't want to have multi plaintiffs. But if the
23 Court does want to have multi -- is considering multi
24 plaintiffs, absolutely, we would file that motion.

25 This idea that colorectal cancer epi is extremely

1 weak is completely wrong. But to that extent, if it was so
2 extremely weak as the defendants posited, then why would they
3 be so fearful of that being the second trial? We think that's
4 absurd.

5 There are numerous epidemiological studies that show
6 statistically significant increased risk of colorectal cancer
7 due to ingestion of NDMA. So I think that's absurd.

8 But nonetheless, this idea that somehow we glean more
9 information by working up numerous different cancer types,
10 hodgepodge of different experts all at the same time is just
11 wrong. It's factually incorrect. We can stage it by doing
12 liver cancer first, colorectal cancer first, then we can go to
13 some of those more rare cancers. Probably stomach cancer would
14 be the next best because that's the third most common. But
15 then you would go then from there, you'd work yourself down to
16 esophageal and lymphoma.

17 But to think that all of them need to be worked up at
18 the same time is just, you know, that's why these other state
19 courts that posited the same question on these various
20 different cancer types, that's why they staged it because they
21 realized that working up, you know, at this point, to be clear,
22 we're talking about at least three different specific -- likely
23 three different specific causation expert reports per cancer
24 type. That would be on the plaintiffs' side. And I wouldn't
25 be surprised, because in this litigation we've seen the

1 defendants like to have even more experts than us.

2 So to the extent now, all of a sudden, we have six
3 different cancer types in this randomly selected pool, we would
4 be talking about potentially, if they had four on their side
5 and we have three on our side, that would be seven times six
6 different cancer types, 42 specific causation expert reports
7 that you'd be looking at. That to me seems absurd at this
8 stage. That's why we stage cancer type. And so we can first
9 handle liver cancer, move on to colorectal cancer, move on to
10 stomach cancer.

11 And the other thing that we didn't talk about too is,
12 we think it's absolutely important that the first cases go as
13 opposed to randomization, which we have already advanced the
14 ball forward for the ZHP API defendants. I'm not surprised the
15 ZHP API defendants are the ones that are speaking on the
16 randomization right now because it inures to their benefit to
17 slow things down, to have to come back to the Mylan and
18 Aurobindo API defendants and get their liability expert reports
19 worked up before we can advance the ball.

20 We've already advanced the ball past that point, and
21 so that's why the first trials can go in late spring because
22 we've already done all the liability expert reports. If we --
23 if we now have to bring in Aurobindo and Mylan, we slow things
24 down. It's even more expert reports that are going to be
25 needed because of that. So that's why the staging is

1 important.

2 THE COURT: Well, Jessica has suggested --

3 MS. DAVIDSON: Your Honor, if I may.

4 THE COURT: Let me just ask a question and then,
5 Jessica, you can certainly be heard.

6 But Jessica did suggest a specific case to be tried
7 first, and that's Gaston Roberts. It's a liver cancer case.
8 It fits within the parameters that you've mentioned.

9 MR. NIGH: It does.

10 THE COURT: ZHP is the defendant in that, along with
11 Princeton, Solco and the pharmacy. So it seems to me you've
12 reached agreement on one.

13 MR. NIGH: We have.

14 THE COURT: And now the question is what comes next.
15 And perhaps that's where we go to randomization. Why can't we
16 reach agreement on the first trial, first case, and then I'll
17 make recommendations on what comes next and how many?

18 I'm not inclined to recommend that there be
19 multi-plaintiff trials. I think they should be
20 single-plaintiff trials. And I'd like to get a schedule in
21 place that gets cases to trial as quickly as makes sense. So
22 that's what I was hoping to accomplish today.

23 I think we have, as I said, with all due respect, I
24 think you have agreement on what the first case should be, at
25 least an agreement between Jessica and you, Daniel, that the

1 first trial should be Gaston Roberts. After that we don't have
2 agreement. But do you disagree with that, Jessica?

3 MS. DAVIDSON: Well, Your Honor, I just want to
4 say -- I don't disagree with that, first off. But I do want to
5 just add that Mr. Nigh said something about us being afraid of
6 colorectal cases. I do want to make clear that as a basic
7 concept of statistics, since '12 about 50 percent, I believe,
8 of these cases are colon cases, if we go randomly --

9 MS. LOCKARD: Of the bellwethers.

10 MS. DAVIDSON: I'm sorry?

11 MS. LOCKARD: Of the bellwethers, not of the entire
12 set.

13 THE COURT: Of the 28.

14 MS. LOCKARD: Right.

15 MS. DAVIDSON: Of this bellwether pool, about
16 50 percent are colon cancer cases. So if we were to randomly
17 select a pool of cases for work-up from here, 50 percent of
18 that pool on average would be colon cancer cases. So I think
19 it's silly to say that we're somehow afraid of colon cancer
20 cases. We're not.

21 What we want is desperately, after all these years of
22 waiting and this litigation lingering, we desperately want to
23 move things forward to have real knowledge about the value of
24 this bellwether pool as a whole. And that's why I am like
25 emphatic in my efforts to urge the Court that we should be

1 working up a pool of cases simultaneously with preparing this
2 case for trial so that we can get a fuller range of knowledge
3 about the value of these cases, about the science for all of
4 these cases, to understand what is the science behind the range
5 of matters here.

6 We have been in this litigation for years. I've been
7 in this litigation for years and when I came to it, it had
8 already been going on for years, and we don't know anything
9 about this bellwether pool. So we try one case and at the same
10 time we're not doing something to work up other cases, we'll
11 still have very little knowledge.

12 So, yes, I agree with you that we're in agreement on
13 the first trial, but I think that has to be a package that also
14 includes working up additional cases for *Daubert* and summary
15 judgment and to find a second case.

16 THE COURT: Well, I agree, I agree with you.

17 MS. DAVIDSON: Thank you for listening to me.

18 THE COURT: I think I can agree and let you maybe
19 allay some concerns here that this will not be a one-case order
20 coming out. We will work up multiple cases for trial. I'd
21 like to get some understanding of the number that you want to
22 have worked up for trial.

23 And I think I can also say with some certainty now
24 that one of the cases will be the Gaston Roberts case. Beyond
25 that, I can't say what the other cases would be.

1 But how many cases are you looking, Jessica, to have
2 worked up?

3 MS. DAVIDSON: I thought that six was a reasonable
4 number. As you know, Your Honor, from other MDLs, cases get
5 dismissed, things happen.

6 THE COURT: They do.

7 MS. DAVIDSON: So if you have anything less than six,
8 you don't -- you could end up with nothing to try.

9 THE COURT: And, Daniel, you want how many worked up?
10 Or none?

11 MR. NIGH: No; I think six is a fair number. But I
12 think they should be -- we should be working up in stages. So
13 by that I mean the second -- because you just heard 50 percent
14 of the cases are colorectal cancer in the bellwether pool.
15 That should be second. That should be the next one that's
16 worked up.

17 The problem that you've just heard and, you know,
18 Jessica just said statistics, well, if we randomly select six,
19 what we're going to likely get from this pool: Three
20 colorectal cancer cases, one of a second type of cancer, one of
21 a third type of cancer, and one of a fourth type of cancer.

22 THE COURT: Understood.

23 MR. NIGH: You get four different cancer types. And
24 if you look at the number of specific causation experts that
25 are going to be needed to address that, you're going to have a

1 ton of expert reports coming all at the same time. And I think
2 it's going to cause chaos. So I think that what makes more
3 sense is going to be -- would be do the liver cancer, then
4 proceed to the -- and then do the colorectal cancer, and then
5 you could proceed to some what would probably be the third most
6 number of cases like gastric cancer. That would give you way
7 more information than what if the random pool includes lymphoma
8 and esophageal cancer that are going to give us very little
9 representation to the overall pool of cases.

10 THE COURT: All right. So what you're proposing,
11 Daniel, is that there be -- we have an agreement. We have an
12 agreement on the liver case to take the bellwether trial. You
13 want a colorectal and gastric did you say?

14 MR. NIGH: You know, if we're going to have six cases
15 and we're going to work them up simultaneously, then I think
16 colorectal and then gastric is the next most common cancer, so
17 we could have that there. I think it makes the most sense to
18 do liver, colorectal, gastric staged. But if we're going to
19 work them up --

20 THE COURT: What do you mean by "staged"?

21 MR. NIGH: You would do the expert reports for the
22 liver cancer case, and we could probably do colorectal at the
23 same time. So those would be the first two that would -- you
24 would do the expert reports, you'd do the briefing, you know,
25 you'd get rulings, and those would be the first two trials.

1 And then in between, while those first two trials are going,
2 you could also then be doing the expert reports for the gastric
3 cancer case. So it would be following up what's happened with
4 those first cancer cases as opposed to doing them all at the
5 same time.

6 THE COURT: Jessica, what's wrong with proceeding
7 along those lines?

8 MS. DAVIDSON: I think that the best way to move this
9 litigation forward hopefully toward some sort of light at the
10 end of the tunnel is to understand the case pool more
11 generally. There are one, two, three -- there are four stomach
12 and two small intestine cases in here, and so we want to move
13 those forward at the same time.

14 I don't see why we wouldn't this many years in find
15 out is there science to support these cases and do they have
16 value.

17 Like, I don't understand what we're waiting for.
18 That's the thing. What are we waiting for this late in the
19 litigation? Why would we be waiting any longer? Why not do
20 this?

21 MR. NIGH: Your Honor, if I may respond to that
22 point.

23 THE COURT: Yeah.

24 MR. NIGH: This idea of understanding the case pool
25 more generally and then is there science to support it, Your

1 Honor, we've gone through general causation. The general
2 causation has already happened for all these various cancer
3 types. So this idea that we don't know the science behind it,
4 that's already occurred. Those epi studies, those expert
5 reports, they're written up, we have all that science. So now
6 you're just talking about specific causation for each expert
7 report. There's no reason that can't be staged.

8 The other thing is, to understand the pool more
9 generally, we've taken the plaintiff's deposition of all these
10 cases. We've taken the treater. We've taken the prescriber.
11 There's lots of information that's already been in here. So
12 the only information I haven't heard is verdicts that the
13 defendants don't know and specific causation expert reports
14 that they don't know. No reason those can't be staged.

15 MS. DAVIDSON: Again, Your Honor, I just don't know
16 what we're waiting for. I think the more information we can
17 get about these cases, the better we are. We're way behind any
18 where I've ever been in an MDL this many years in. And I just
19 don't understand why plaintiffs who have asked over and over
20 and over again to move this litigation forward suddenly want to
21 move at a slower pace. I've got nothing else.

22 MR. NIGH: Your Honor, to be crystal clear, not
23 moving at a slower pace. This is much more efficient. It's
24 actually quicker. That's my point.

25 THE COURT: Yeah.

1 MR. NIGH: If you move in stages methodically, it's
2 quicker than a hodgepodge of expert reports all at the same
3 time. That moves slower. That's why we're proposing a late
4 spring trial and they're proposing a late fall trial.

5 MS. DAVIDSON: And, Your Honor, I just do want to say
6 one thing.

7 THE COURT: Sure.

8 MS. DAVIDSON: I think that October 1 is early fall,
9 not late fall. I'm looking out my window, it's
10 October 15th[sic] and it's 80 degrees. So I just want to be
11 clear that we're not proposing a late fall trial.

12 THE COURT: Yeah.

13 MR. NIGH: Noted.

14 THE COURT: A five-month difference in where you're
15 at, but that's manageable.

16 MS. LOCKARD: Your Honor, the only thing I would add
17 to this is, you know, when we picked these bellwether cases,
18 plaintiffs got to pick 15 and we got to pick 15.

19 THE COURT: Right.

20 MS. LOCKARD: The plaintiffs didn't limit their
21 selection of bellwethers to just colorectal and liver cases.
22 They included other cancer types as well.

23 THE COURT: Right.

24 MS. DAVIDSON: Right.

25 MS. LOCKARD: And that formed the basis of the

1 bellwether pool, which we now should be selecting from. So to
2 say, well, plaintiffs get to decide it's going to be -- and
3 putting the liver case aside because that's the ZHP, the first
4 case, but when you're talking about the second case to say,
5 well, plaintiffs get to pick the cancer, it's colorectal,
6 plaintiffs get to pick the defendants, it's going to be the ZHP
7 line of defendants, you know, essentially, the defendants are
8 left without any say-so in this process at all.

9 And if you -- you know, in our briefing and our
10 papers you saw there's a potential motion related to the NDEA
11 issue which may further narrow down some of these cases that
12 are available in the bellwether.

13 THE COURT: Right.

14 MS. LOCKARD: But essentially, we're being taken out
15 of the process. And that's why we suggested a randomization.
16 We thought it was fair.

17 I mean, if we're not doing randomization, then it
18 should be some sort of procedure where each side picks three,
19 or, you know, we take turns picking or something to that
20 effect. But just to say, well, you know, plaintiffs are going
21 to dictate the parameters within which these six cases are
22 chosen, that totally takes defendants out of it.

23 And I will say, you know, having -- certainly I
24 represent Teva and we are more than ready and prepared to go
25 try these cases, but there are defendants who are in this

1 litigation and they do want to get their cases worked up and
2 tried at some point. And so to totally cut them out and to
3 focus all six or seven cases on Teva, Torrent and ZHP seems a
4 little bit askew when we do have other defendants who are
5 sitting there waiting for their cases to be worked up, tried
6 and resolved through the process.

7 MR. NIGH: Your Honor, if I may, because I think
8 we're conflating two ideas. This idea that -- we're conflating
9 the idea of weak cases or cases we may just want to dismiss
10 with the idea of staging for efficiencies.

11 So, yes, Victoria just pointed something out. We
12 picked cancers that were not esophageal -- that were not just
13 colorectal or liver. This proposal is not just because we see
14 them as the strongest cases. It's not plaintiffs picking the
15 cancers. This is the number of cases in the pool. We're
16 trying to put forward a proposal that's the most representative
17 of the pool of cases out there in the litigation.

18 We did pick other cancers because we think there's
19 strengths in other cancers. But staging is more efficient and
20 it would be more representative of the pool as we try those
21 cases. I don't know that we necessarily need to have a verdict
22 on every single cancer type, but we should get verdicts on the
23 most common cancer types.

24 MS. LOCKARD: Well, liver certainly is not among the
25 most common cancer types in all of the filings.

1 MR. NIGH: It's the second most common. Liver,
2 colorectal. That's in our papers. The next after that --
3 liver cancer is almost 20 percent. Colorectal is 35 percent,
4 and after that all the rest of the cancers are less than
5 10 percent. So it's clearly the most common. Those are the
6 most two common cases. Once you start going after colorectal
7 and liver, you have a nosedive in terms of the percentages, and
8 stomach cancer is right around 10 percent.

9 MS. LOCKARD: Well, we have different statistics
10 based on those, I can tell you. And some of it depends on what
11 the plaintiffs put in their fact sheets, which isn't always a
12 hundred percent accurate, but I am not endorsing those.

13 MR. NIGH: Your Honor, there can't be different
14 statistics to show that there's some other cancer type that's
15 the second most likely. I don't care how you splice the
16 numbers or look at the data, there's no way you're going to
17 splice that data to where, all of a sudden, another cancer type
18 is the second most common. It's not even close.

19 MS. DAVIDSON: So just to be clear, Daniel, your
20 statistics are that 35 percent are liver and 20 percent are
21 colon? That gets to 55 percent. That means you just want to
22 put on ice 45 percent of this litigation, because that's --

23 MR. NIGH: No, no, not ice. Staged.

24 MS. DAVIDSON: I'm sorry. I wasn't finished.

25 MR. NIGH: Okay. Because you're using words that I'm

1 not saying. Staged, not on ice. That was my point, conflating
2 two issues.

3 MS. DAVIDSON: Right. But we may as well. We've got
4 45 percent of the pool -- we have a bellwether process that the
5 Special Master is about to enter that would basically ignore
6 45 percent of the pool. And my understanding is that, you
7 know, Judge Bumb would like to get as much information as
8 possible. She's made that pretty clear as to what her goals
9 are. And getting information about that 45 percent of the pool
10 in the next, you know, within the next 10 to 12 months would be
11 very helpful. And I believe she does have the energy and
12 inclination to rule on motions involving multiple types of
13 cancers, which will do the most to get us where we need to be
14 in this litigation.

15 MR. NIGH: Your Honor, when we talk about
16 randomization, we have to talk about that in perspective,
17 because now she said we're ignoring 45 percent of the pool. I
18 don't think that's exactly what's happening here. We're
19 staging the first two cases and prioritizing 55 percent of the
20 pool. We can come to the next ones thereafter.

21 But this idea that somehow randomization is going to
22 pick up the other 45 percent is just wrong, too. We're going
23 to randomly pick three other cases and they're going to make up
24 something like 3 percent, 5 percent, 4 percent. So you might
25 pick up another 12 percent out of that 45 percent. That

1 doesn't get you -- that's not a big difference between
2 prioritizing the first two cancers and picking up 55 percent of
3 the cancers in the first two trials.

4 THE COURT: Okay. So we can continue to go round and
5 round on this.

6 The bottom line is, we will have Gaston Roberts as
7 the first case -- as one of the cases at least to be worked on.
8 I'm not saying the first trial. I will pick five other cases
9 on a randomized basis. I'll use a randomizer, an online tool,
10 to identify five others from the 28. Because we're only
11 talking about a pool of 28 cases, so it's not that large a
12 pool. And those cases will be worked up for trial, specific
13 causation expert witnesses, whatever else needs to be done with
14 respect to readying those cases for trial. And that's how
15 we'll proceed here, because I think we're spending a lot of
16 time arguing over matters that aren't going to have a
17 substantial impact here.

18 You're going to have six cases that will be, as I
19 said, I'll use an online randomizer, I'll pick the other five
20 cases. You have one that you know and we'll get those worked
21 up for trial.

22 Time frame, well, I'm going to think about somewhere
23 between May 1st and October 1st, frankly.

24 I know, you know, Jessica, you feel strongly that you
25 need all that time to get ready for the first trial. And,

1 Daniel, you don't think you need that much time to get ready,
2 and I happen to think it's somewhere in between the two.

3 And I think you can get a case ready within that time
4 frame, recognizing that there's going to be perhaps a
5 dispositive motion or motions with respect to the cases. There
6 may be *Daubert* motions, recognizing that, and can't control the
7 timing of their disposition, but you can have a schedule for
8 getting them worked up so that they're ready for decision. And
9 that's what my aim is going to be here in the next few hours.

10 So let's say you've got a determination from the
11 Special Master that there will be six cases worked up for
12 trial. One will be, because there's no dispute on this one,
13 Gaston Roberts. The other five I will randomly select using an
14 online randomizer. So it will be completely random. It may
15 include a colorectal case; it may not. That's the point of
16 using a randomizer.

17 But we'll get the cases necessary for you to focus
18 on. So we can get these cases and you can get the data, the
19 information you need for purposes of making all the difficult
20 judgments that have to be made in terms of settlement, for
21 example. So that's how we're going to proceed with the
22 selection of the cases.

23 MR. NIGH: Thank you, Your Honor.

24 MS. DAVIDSON: Thank you, Your Honor.

25 Your Honor, I assume once you provide the trial date,

1 that you would like us to meet and confer on pretrial
2 scheduling up to that date? Is that how you'd like us to do
3 it, or will you issue an order?

4 THE COURT: I would like you to do it that way. I
5 would like you to have to say, okay, Vanaskie has told us we
6 have to have the first case ready for trial by July 1st. I'm
7 not saying that's the date, just hypothetical. Then I'd like
8 you to propose the other dates that allow you to get that case
9 to trial by that date.

10 It's going to be a busy summer, I think, for you all.
11 That's all I'm trying to forecast here. But it would be six
12 cases, and one of which will be the Gaston Roberts case.

13 Go ahead, Daniel.

14 MR. NIGH: Your Honor, just for clarity, sorry, I
15 didn't mean to interrupt, but just for clarity, the Gaston
16 Roberts, as we agreed, would be the first case to trial.
17 Because the reason behind that is that in terms of staging and
18 how we're preparing the scheduling of getting it to trial, we
19 then don't have to have the liability expert reports for Mylan
20 and Aurobindo decided upon before that case goes to trial.

21 THE COURT: Okay.

22 MR. NIGH: Or, you know, it can be sometime
23 thereafter. And we don't have deposition designations and all
24 the rest of that. That can happen -- that's the reason why the
25 ZHP API-only defendant for the first trial.

1 THE COURT: Well, Gaston Roberts will be the first
2 case to go to trial, all right.

3 MR. SLATER: Your Honor, it's Adam Slater. I finally
4 got in here by phone. Sorry for the delay before.

5 THE COURT: I'm glad you're able to join.

6 MR. SLATER: I'm going to ask something, and I'm not
7 sure how everybody else feels about this. When we have this
8 much time ahead of us, if possible to avoid having to try the
9 case in the summer next summer, I would ask Your Honor to try
10 to see if we can do it before or after. I don't know how the
11 other lawyers feel about it. I can tell you, I know, from my
12 perspective, things are already being planned for next summer.
13 I don't know where other people land on that. I would like to
14 think there's plenty of time before the summer to get the case
15 tried, but just something to put in your mind on that.

16 THE COURT: Well, what do you consider to be the
17 summer?

18 MR. SLATER: July and August.

19 THE COURT: Okay.

20 MS. DAVIDSON: Your Honor, in that case, we -- as you
21 know, I mapped it out in my head for October. But we could
22 also do a trial September.

23 MR. SLATER: I'm not advocating for after the summer.
24 I'm just saying it's something to think about. I don't know
25 how the other attorneys who are going to be involved in the

1 trial feel about it. I don't know what their availability is.
2 It's just something to put out there. If I have to cancel all
3 my plans, then I probably will have to cancel all my plans. I
4 don't know what other people are doing with their summers, too.

5 MS. DAVIDSON: Your Honor, ZHP can proceed with a
6 summer trial despite vacations. But if Mr. Slater wants to
7 save his July and August, I would request that we not get
8 jammed as a result of that and that the trial be in September.

9 MR. SLATER: I don't think I'm suggesting to jam
10 anybody. I can't imagine how this trial against ZHP can't be
11 prepared and done before the summer, considering all the
12 work-up we've already done as to them. But obviously I'll
13 leave it to Your Honor's discretion what you do. I just wanted
14 to make that point and move on from it.

15 MS. DAVIDSON: Before you joined, Adam, Judge
16 Vanaskie made the comment that he thought there should be a
17 compromise of -- that May seemed early and October seemed late
18 so the compromise --

19 MR. SLATER: No. I was on the whole time.

20 MS. DAVIDSON: Oh.

21 MR. SLATER: I'm sorry. I was on. I heard it. I
22 heard it all. But thank you.

23 THE COURT: Okay. Well, maybe we come away from this
24 with one thing set and that the first trial will be in
25 September, probably around September 1st, or right after Labor

1 Day.

2 MS. DAVIDSON: Thank you, Your Honor.

3 THE COURT: All right. I will pick a date, but it
4 will likely be September 2nd, all right. And that will be for
5 the Gaston Roberts matter.

6 And as I said, I will use an online randomizer to
7 pick the next five cases to prepare for trial, to work up for
8 trial.

9 Lexecon waivers. I wasn't exactly sure what the
10 defense position on the Lexecon waivers is. So maybe somebody
11 can articulate it better for me.

12 Anyone?

13 MR. STOY: Sorry. I was on mute. For the record,
14 good afternoon, Your Honor. Frank Stoy on behalf of the Mylan
15 defendants.

16 I'll speak briefly to this issue. Our position
17 generally, Your Honor, for those of us who have Lexecon rights
18 to waive, which is not all the defendants, but is many, maybe
19 even most, is that we're not in a position to do that today.

20 As Your Honor knows, once Lexecon is waived with
21 respect to a specific case, you can't go back. Once I think we
22 as a defense group have an understanding of which five cases
23 are selected to be the other cases that will be worked up in
24 addition to the Roberts case, then I think we'll be in a
25 position to evaluate Lexecon waivers further and provide more

1 information to the Court with regard to that.

2 But I would just say, for the record, just to be
3 completely clear, you know, any waivers that would be issued by
4 any defendant would be specific just to one of those cases and
5 would not apply more broadly to other cases that are
6 consolidated in the MDL proceeding.

7 THE COURT: That much is understood, I believe.
8 There wouldn't be a waiver across the board.

9 Daniel, you disagree with that?

10 MR. NIGH: Well, this kind of highlights the reason
11 why I thought the second prioritization should be -- the first
12 two trials would be ZHP API-only defendants and not include
13 Mylan or Aurobindo. Because now what you're hearing is you're
14 going to randomize and then the defendants are going to decide
15 if they want to say the ones that are Mylan cases, they're
16 going to then be able to decide if they want to not waive
17 Lexecon for those cases. So now they get to basically in some
18 way cherry-pick the cases that they don't like by saying
19 they're not going to waive the Lexecon. That's the problem.
20 So we could have put that whole issue at bay by not including
21 Mylan or Aurobindo for the first two trials.

22 MR. STOY: Your Honor, just if I may respond to that
23 just to make clear, it wouldn't be a cherry-picked situation.
24 It would be -- the cases would need to be remanded to some
25 other court to be tried. That's the issue. It's just where

1 the case would be tried, not if it would be tried. And of
2 course plaintiffs have *Lexecon* rights as well that they would
3 have to -- you know, individual plaintiffs would have to waive.
4 So I think the only way to go about it really is to do it in
5 this incremental fashion that we've suggested.

6 THE COURT: Yeah.

7 MR. NIGH: Well, if I can continue, for the cases
8 that were ZHP API-only defendants, we wouldn't have that issue.
9 So, you know, in terms of the plaintiffs' side, we've spoken
10 with those counsel. So I think that to that degree, you are
11 going to see some sort of selection here to the extent that the
12 Judge wants to try the case in front of her, if all the cases
13 that happen to be Mylan, and there's a decent number of them,
14 all the cases that happen to be Mylan are now going to somehow
15 be taken out of this priority pool that have to be remanded.

16 MR. STOY: Your Honor, again, I think this is not
17 just -- counsel's framing this as, you know, a Mylan-specific
18 issue. It's not. Many of the cases, maybe even most of the
19 cases that involve ZHP API also involve wholesaler defendants
20 and pharmacy defendants, and those entities would also have
21 *Lexecon* rights.

22 So even if we just stuck to ZHP cases, it does not
23 necessarily get around this issue.

24 THE COURT: Understood.

25 So I guess what I'm saying is that we'll get to the

1 Lexecon waiver issue on a case-by-case basis once we've
2 selected the five other cases.

3 I take it there's no Lexecon issue with respect to
4 the Gaston Roberts matter?

5 MR. NIGH: That's correct, Your Honor.

6 MS. DAVIDSON: Your Honor, I would also note,
7 although we don't have Lexecon issues to raise, that a Lexecon
8 issue does not affect pretrial rulings, et cetera. So a lot of
9 work can still be done on those cases.

10 THE COURT: Right.

11 MS. DAVIDSON: I want to make sure that's clear.

12 THE COURT: Well, thanks for that, Jessica.

13 And so we'll select the cases. You know you've got
14 an anticipated trial date or approximate trial date for the
15 first bellwether trial. Once you receive the list of the four
16 other -- the five other cases, then we'll have another
17 conference call to talk about what needs to be done in terms of
18 working those cases up for trial, unless we can have that
19 discussion now. But I think it's hard in the abstract.

20 I am not hearing anybody. Go ahead.

21 MR. NIGH: Your Honor, I do think it is more
22 efficient after seeing the five cases to have that
23 conversation, because in seeing what those cases look like, it
24 informs, you know, you might go five for five on picking
25 colorectal randomly and it changes the situation. But I

1 think -- you know, I think after we've seen the picks, then it
2 makes more sense to have the discussion thereafter on the
3 work-up and the staging for the second case going forward.

4 THE COURT: Okay.

5 MS. LOCKARD: Agreed.

6 THE COURT: Yeah. I think that makes more sense.
7 Yeah. I think there's agreement on that. Good. Good. Good.

8 MS. DAVIDSON: Your Honor, I don't disagree with
9 that. I would just say that with the first trial not scheduled
10 until September and multiple defendants being involved in the
11 case pool, I think there will be appetite on the defense side
12 to be working those up simultaneously so we're ready to go.

13 THE COURT: Sure. That's what I'm hoping that we can
14 accomplish.

15 Listen, this has been delayed way too long, for lots
16 of reasons. But it's time to get it to the point where it can
17 be tried. And maybe I'm giving you too much time to go to
18 September, but I think that makes sense.

19 I wanted to talk about Maggie Kong and Jinsheng Lin
20 because they're going to be witnesses and you need a decision
21 from me. And I'm hoping, Adam, you're still available and can
22 be heard on this.

23 Here's where I come out: I think you were lulled
24 into believing that Maggie Kong had no relevant information and
25 now she's being called as a trial witness. So I understand the

1 consternation that you have over that fact.

2 On the other hand, you have time now to take Maggie
3 Kong's deposition, because it seems to me the biggest problem
4 would be the surprise testimony, but you can alleviate that
5 surprise or minimize it, at least, by taking her deposition.

6 So why shouldn't I just -- you know, why shouldn't I
7 just allow those persons to testify subject to them being
8 deposed by you? You've asked that their depositions occur here
9 in the United States. And I think I could direct that as well.
10 But why isn't that sufficient to avoid this issue?

11 MR. SLATER: Well, Your Honor, I think that with
12 regard to Maggie Kong, and we're talking now about the personal
13 injury cases, I'll put the econ loss cases to the side. The
14 proffer was that she was going to provide some information
15 relevant to the econ loss recall.

16 That proffer also, as Your Honor knows from the
17 briefing, expanded what she supposedly knew. So we think that
18 the prejudice and the fact that they took a very hard and fast
19 position, I'm not talking about judicial estoppel, but there
20 are certain principles of fairness and gamesmanship that should
21 be avoided.

22 If Your Honor decides that okay, there's enough time,
23 what we don't want to do is we don't want to be put in the
24 situation where now we take their depositions and they're
25 suddenly no longer available and they're able to actually get

1 this testimony in through video depositions where they
2 otherwise would have to bring them to court. So we would want
3 to foreclose that as a possibility if we have to depose them.
4 And the way to do that would be this:

5 Once the case is set for trial, just set a window
6 before the trial actually starts for them to be deposed here in
7 the United States shortly before the trial, with the
8 understanding that they're still -- this is not going to be a
9 substitute for their live testimony.

10 If they're going to testify, then I can depose them
11 shortly before the trial when they're here in the United States
12 for the trial and then we can move forward on that basis.
13 That's Maggie Kong.

14 We obviously have other issues with Jinsheng Lin that
15 go to the fairness of us even having to depose him. I won't
16 address him yet.

17 THE COURT: Well, we'll address him separately.

18 Jessica, are you going to respond on this?

19 MS. DAVIDSON: I have no issue with having them
20 deposed in person in the U.S. shortly before trial. There was,
21 as I indicated at the last hearing when Adam raised this issue,
22 it had never come to our mind to do anything like that. It's
23 completely speculative. I felt like it was a conspiracy
24 theory. We had no intention of doing anything of the sort. We
25 just wanted to ensure that we were able to present our

1 witnesses at trial. So to the extent Adam wants to depose them
2 in the U.S. in the days leading up to trial, that's fine.

3 THE COURT: All right. Well, I think we have at
4 least an understanding as to Maggie Kong. Maggie Kong can
5 testify at trial in the bellwether plaintiff case. She will be
6 deposed here in the United States before the trial. You'll all
7 have to work out the scheduling of that. But it will not be a
8 substitute for her trial testimony, all right?

9 And I think I see Jessica nodding her head. And,
10 Adam, I can't see you, but I guess that's acceptable to you as
11 well.

12 MR. SLATER: Yes, Your Honor. I understand.

13 THE COURT: All right. Very well. Now let's talk
14 about Jinsheng Lin.

15 What's the problem with taking his deposition?

16 MR. SLATER: Oh, the problem with him goes -- I mean,
17 we had the problem with her custodial file also with the gaps,
18 but she's far less of a substantive witness. It's still
19 unclear what she's even going to say aside -- the proffer
20 doesn't really fill much in. We obviously have a huge gap in
21 her custodial file. To the extent that we go through it and
22 we're ready and she talks about things that fall into that gap,
23 I guess we'll have to deal with it.

24 But Jinsheng Lin is a different animal. He's the
25 person who wrote an email that's obviously of significance, and

1 there are massive, massive gaps to his custodial file.

2 Whatever defense wants to say about why -- they've
3 never explained why there aren't documents. They vaguely
4 referred to some document preservation policy that we've never
5 seen. The point is that, and it's in our brief, I don't -- I'm
6 sure that Your Honor has read that and seen the very little bit
7 we have from 2017 and before that we -- so we're basically
8 hamstrung in a very unfair way for being able to effectively
9 prepare for and cross-examine this witness.

10 On its face, his custodial file is so insufficient
11 and has such huge missing information that we're being put in a
12 situation where we're going to have to cross-examine a witness
13 without the documents that would be able to allow us to
14 actually establish the points we want to make, like -- we could
15 argue all day long with the ZHP explanation about that email
16 and say, well, it was about irbesartan. The fact is that every
17 witness who's testified on the document and every translation,
18 including ZHP's own translation, says that it says there was
19 NDMA in valsartan and it was formed by sodium nitrite
20 quenching.

21 We don't have any documents from this witness in
22 terms of what led him to know that. We don't have the story.
23 We don't have the background. So all he's going to do,
24 presumably, based on what they've told us, is he's going to
25 walk in and say, well, it's not really what it says, even

1 though the witnesses testifying for the actual -- for the
2 company as 30(b)(6) witnesses said this is what it says, even
3 though the translation said this is what it says, or he's going
4 to say something else to try to explain it away. But we don't
5 have his custodial file in a way that we can actually know,
6 okay, this is everything he had, this is what he saw. These
7 are studies. These are analyses. This is why he knew that and
8 this is how we can undercut whatever explanation and excuse
9 he's trying to come up with.

10 So the prejudice to us is massive from that, and to
11 have him now be able to come in and potentially disagree with
12 30(b)(6) witnesses who said that's what the words say, it says
13 there's NDMA in valsartan, and it's formed by the sodium
14 nitrite quenching. And then there's other things, too, all
15 true. It's a problem with sartans. It's highly toxic and it
16 would evidence a cGMP problem. All those things were true.
17 But we don't have his custodial file in anything remotely
18 resembling a reasonably complete manner. So we're terribly
19 prejudiced in our ability to adequately cross-examine and
20 question this witness.

21 THE COURT: I understand your argument. The problem
22 I have is, I've got a representation, at least a
23 representation, if not an affidavit, to the effect that we have
24 provided everything from Jinsheng Lin. You can doubt that and
25 say that's not credible. But is that enough to say he doesn't

1 get to testify, or do I have to make the credibility
2 determination based upon the absence of documents you think
3 should be there and the other side says they're not there?

4 MR. SLATER: I think that the way to handle this,
5 Your Honor, because, as you said, we have a lot of time now, is
6 let us take a 30(b)(6) deposition on Jinsheng Lin's custodial
7 file and the document policies that they claim his files were
8 destroyed based upon. Let's have a witness speak for the
9 company about what documents existed, what documents were
10 destroyed, when and why. And let's see what the explanation is
11 so that when Your Honor makes this ruling, you know exactly
12 what they're saying. Because what we've gotten is vagaries.
13 We've gotten: "That's all we had."

14 Well, okay, it's easy to say, but let's find out why
15 that's all they had. It's not going to cost us a lot of time
16 or effort. Let them produce whatever document policy they're
17 claiming or identify it in the production because, presumably,
18 they've produced everything, and let us take that deposition
19 and let us then make a record for Your Honor on this because
20 it's of such significance.

21 And if worse comes to worse, from our perspective,
22 and Your Honor allows the testimony, at least we'll have a full
23 record on which to potentially put a witness on the stand to
24 show the jury that the idea that his custodial file wasn't
25 manipulated or whatever word you want to use or doesn't fairly

1 represent what was there so that we're at a disadvantage.

2 And I'm not talking about a spoliation inference,
3 although who knows what the evidence will be. I'm talking
4 about just factually at the very least that we don't have those
5 documents and here's why, so that we can adequately rebut
6 whatever this person says about his email, which every other
7 witness that has testified about it says it has those words in
8 it. So that's what we would ask for.

9 THE COURT: All right. Thank you.

10 Jessica.

11 MS. DAVIDSON: Your Honor, the efforts by plaintiffs
12 to avoid deposing the person who wrote the email on which
13 they're making their entire case have now become so extreme
14 that plaintiffs want to depose someone else to ask them what
15 happened to Mr. Lin's files.

16 So we know that Dr. Lin did not work on valsartan.
17 If plaintiffs want to know how did you handle documents, how
18 did you get rid of documents, we have been offering this man
19 for a deposition for nine months. Let them ask him, Dr. Lin,
20 how did you keep documents? What happened to them? Whatever
21 Adam wants to ask him, he can ask him. But to have discovery
22 about discovery at this point makes no sense.

23 As you know, Your Honor, this company has already
24 been sanctioned. This was not part of the sanction. There was
25 no sanction that Mr. Lin can't testify. And I just want to go

1 back to something that I said last time, which is, Judge Bumb
2 has made it very clear that she does not want to create error.
3 Having a trial where the smoking gun is an email by someone who
4 has been barred from testifying to me is a violation of due
5 process that would undermine the whole point of having a trial,
6 because it would be this baked-in error.

7 So I would suggest that, at his earliest convenience,
8 Mr. Slater depose Jinsheng Lin and ask him all the questions he
9 wants about his files, how they were kept, what they contained,
10 et cetera, and then plaintiffs will have that evidence, any
11 evidence they want.

12 But not to allow the person who wrote the email that
13 is so central to this case to testify just strikes me as
14 undermining the entire validity of the bellwether trial.

15 THE COURT: All right. Here's how -- here's what
16 we're going to do, here's how we will proceed: Adam, you can
17 take Jinsheng Lin's deposition. You can ask him questions
18 intended to probe what happened, why aren't there more
19 documents, how is it that I don't have the backup for what
20 you're asserting. And then after you take that deposition, you
21 can come back, because I think there's enough time now to do
22 this, and ask for a 30(b)(6) witness on preservation policies
23 or other reasons why documents you believe should exist don't
24 exist.

25 It may be you take his deposition you won't need to

1 do that, but with those -- with Jinsheng Lin's deposition and
2 the 30(b)(6) following his deposition, you should be able to
3 have your record if you need to seek sanctions again for
4 spoliation. But absent that, you don't have a record right now
5 sufficient to support it, in my judgment.

6 So that's how we'll proceed with respect to Jinsheng
7 Lin.

8 Now, you could expect that he will be allowed to
9 testify unless I'm presented with a record that convinces me
10 there was spoliation of documents, material documents that bear
11 on this issue.

12 MR. SLATER: One question, Your Honor.

13 THE COURT: Yes. Go ahead.

14 MR. SLATER: I'm sorry. First of all, they can
15 designate Jinsheng Lin as their 30(b)(6) witness if they want
16 to. I just assumed he wouldn't be the one because he would say
17 I don't really know how documents are maintained at the
18 company. But they could have -- so it's not that they have to
19 designate someone different. It would just be to designate
20 somebody. But if that's how you want us to proceed. My only
21 remaining concern is I don't want this deposition to become an
22 avenue for them to now claim he's unavailable and then they
23 just use the video. That was our concern with deposing him
24 long before trial when they first named him three or four weeks
25 before the first trial.

1 So I would appreciate the same caveat we had with
2 Maggie Kong, and then we can work on getting ready to take his
3 deposition.

4 THE COURT: Jessica.

5 MS. DAVIDSON: Same response, Your Honor. My
6 response before went to both witnesses.

7 THE COURT: Okay. So you have that understanding
8 that this will not be -- the deposition won't be intended to
9 provide an opportunity for his testimony then to be replayed at
10 trial. The expectation is that he will be called live at
11 trial, all right?

12 MR. SLATER: Understood. Thank you.

13 THE COURT: All right.

14 MS. DAVIDSON: Thank you, Your Honor.

15 THE COURT: Let's take a five-minute break.

16 (Recess was taken at 2:10 p.m. until 2:18 p.m.)

17 THE COURT: John, are you ready?

18 THE COURT REPORTER: Yes, Your Honor.

19 THE COURT: Jessica, I see you're on screen now. Is
20 the defense ready?

21 MS. DAVIDSON: Yes.

22 THE COURT: And, Daniel, I have you and I take it
23 Adam is available, too. So we're ready on the plaintiffs'
24 side?

25 MR. SLATER: Yes, Your Honor.

1 THE COURT: All right.

2 MR. SLATER: One quick question about that last
3 ruling. The deposition of Mr. Lin, I think you had said
4 earlier that we could do these depositions in the U.S. I just
5 want to confirm his deposition will be here in the United
6 States.

7 THE COURT: Did you want to say anything on that,
8 Jessica?

9 MS. DAVIDSON: I guess what I would say is when we
10 were going to have Maggie's deposition in the U.S., Adam
11 indicated it would be right in the lead-up to trial so she
12 would only have to come to the U.S. twice. Is Adam envisioning
13 that Jinsheng Lin would have to come to the U.S. -- she would
14 only have to come once. Is Adam envisioning that Jinsheng Lin
15 would have to come to the U.S. twice?

16 MR. SLATER: Yes.

17 MS. DAVIDSON: Both for deposition and for trial?

18 MR. SLATER: I am.

19 MS. DAVIDSON: I don't understand why it would have
20 to be in the U.S. I guess I would ask that given the expense
21 and burden of that, we're not going to use the deposition for
22 trial anyway, that it take place in Macao the way the other
23 depositions have taken place of the Chinese witnesses.

24 THE COURT: Adam.

25 MR. SLATER: I -- I made my argument, Your Honor.

1 I'm not going to go back and forth on it.

2 THE COURT: All right. Jinsheng Lin's deposition can
3 take place in Macao, as the other depositions have been taken,
4 all right.

5 MS. DAVIDSON: Thank you, Your Honor.

6 THE COURT: One of the issues that's outstanding --
7 and I'll preface by saying I don't think this is an issue for
8 the Special Master -- deals with the request for clarification
9 regarding *Daubert* Hearing Order 1, and this is ECF 1976.

10 Is it understood that that's an issue for Judge Bumb
11 to decide?

12 MR. SLATER: I believe so, Your Honor.

13 THE COURT: Okay. No disagreement.

14 Frank, did you want to be heard on that?

15 MR. STOY: No; we agree, Your Honor.

16 THE COURT: All right. Punitive damages discovery.

17 (Simultaneous speaking.)

18 (Court reporter clarification.)

19 MR. SLATER: Judge, I was just saying -- it's Adam
20 Slater.

21 THE COURT: Go ahead.

22 MR. SLATER: Your Honor, it's Adam Slater. I was
23 just going to just say the only caveat is that, again, that
24 doesn't apply to all the cases. It will apply to some subset.
25 So it's just something to keep in mind, Your Honor.

1 MR. NIGH: Yeah. The other thing, Your Honor, is
2 that there is new additional evidence on NDEA. So that's
3 something we've got to recognize as well, in terms of the
4 scheduling. That's one of the reasons why, you know, having
5 the first case go before, the ZHP API-only defendants. And we
6 suspect that even of the Torrent cases, they're not going to
7 implicate the NDEA side because a lot of their pills are NDMA.
8 That's one more reason why putting forth that issue, we don't
9 have the sort of new science, NDEA new opinions issue if that
10 happens.

11 THE COURT: All right. So that doesn't help me a
12 whole lot here in terms of understanding what that means.

13 MS. LOCKARD: Your Honor, if I can clarify.

14 THE COURT: Okay.

15 MS. LOCKARD: I think the understanding is that
16 certainly the NDEA issue does not affect the first trial, the
17 Gaston Roberts case.

18 THE COURT: Okay. All right.

19 MS. LOCKARD: It may impact some of the cases that
20 are in the remaining bellwether pool that are subject to the
21 randomization, but it may not.

22 THE COURT: Right.

23 MS. LOCKARD: So --

24 MR. NIGH: That's right, Victoria. Thank you for
25 clarifying. I think we should revisit that, too, in terms of

1 the timing once we've seen what's selected in the pool.

2 THE COURT: Okay. Understood. And that's what we'll
3 do.

4 MR. NIGH: Thank you.

5 THE COURT: Punitive damages discovery, have you
6 worked out a stipulation on that or where does that stand?
7 Adam?

8 MR. SLATER: We've sent to the defense a proposed
9 stipulation before the trial was adjourned, and we're just
10 waiting for a response.

11 THE COURT: All right. That might be one of those
12 loose ends we tie up when we get back together in a few weeks
13 after I identify the other five cases for trial.

14 Now, Adam, in your submission for today, you raised
15 the interesting question of a trial for the consumer economic
16 loss cases or case.

17 MR. SLATER: Yes.

18 THE COURT: Can you elaborate on that?

19 MR. HONIK: Your Honor, this is Ruben Honik. I'm
20 happy to elaborate on that, if I may.

21 THE COURT: All right.

22 MR. HONIK: Good afternoon, Judge.

23 THE COURT: Afternoon.

24 MR. HONIK: I've been listening obviously to this
25 argument today. I think everyone is keenly aware we're coming

1 up on something like a seven-year anniversary of the first
2 filed cases here. Everyone is somewhat exasperated about the
3 movement and wanting to get some closure.

4 In particular, it bears mentioning, and everyone
5 knows this, that in February of 2023, when Judge Kugler
6 certified the TPP classes, he also certified a consumer class.
7 And to state the obvious, I think all factual discovery has
8 been done that would cover both the consumer and TPP aspect of
9 this MDL. Obviously there remains some specific expert work on
10 damages in particular that needs to be done.

11 But inasmuch as we're not looking at a first trial
12 until the third quarter of 2025, and subject of course to
13 Judge Bumb's availability or your availability or someone's
14 availability, we think it a good idea in the first or second
15 quarter at the latest of 2025 to tee up a consumer trial. It's
16 largely ready to go. There are some additional damage experts
17 that would need to be proffered, but apart from that, that case
18 is largely ready. And so, therefore, subject of course to the
19 Court's availability or some ability to hear that case or have
20 that case heard, we would strongly urge the Court to consider
21 putting that on the calendar for the beginning part of 2025.

22 THE COURT: Who wants to respond on behalf of the
23 defense?

24 MR. OSTFELD: Good afternoon, Your Honor. It's Greg
25 Ostfeld. I can respond for the defense.

1 THE COURT: Okay.

2 MR. OSTFELD: So, Your Honor, I believe this issue
3 that Mr. Honik is raising pertains directly to the concerns
4 that Judge Bumb raised at the last case management conference
5 regarding the viability of the worthlessness theory, the
6 retroactive worthlessness theory that was the predicate for the
7 certification of both the consumer classes and the TPP classes.

8 Mr. Slater's letter raises the subject -- the
9 question of presenting new damages experts asserting a new
10 theory, specifically a conjoint analysis for the consumer class
11 cases and then reopening expert discovery in connection with
12 the third-party payor cases. The problem with that is it takes
13 us back about four years in the MDL.

14 Judge Kugler held in connection with MTD Opinion 2
15 that there wasn't a factual allegation to support a
16 diminution-of-value theory, which is what a conjoint analysis
17 or reopening discovery would go to.

18 There isn't, as we were discussing at the last case
19 management conference, a basis to proceed on a worth less, two
20 words, theory. And when Judge Kugler certified the classes,
21 his predominance analysis again focused specifically on the
22 worthlessness, one word, theory. He didn't find that there was
23 a predominant common issue on a diminution-of-value theory or a
24 class-wide model of damages that would support that theory.

25 So what plaintiffs are proposing is essentially to go

1 back in time, alter their theory of damages from a, one word,
2 worthlessness theory to a two-word "worth less" theory, which
3 would require revisiting Judge Kugler's MTD Opinion 2 and
4 proceeding on classes on a theory that wasn't certified as a
5 predominant theory, which would require decertifying the
6 existing classes and having new class certification hearings.

7 I think what Judge Bumb said at the last case
8 management conference is she thinks there is a need to
9 reconcile Judge Kugler's MTD Opinion 2 and his summary judgment
10 ruling. I think the class certification ruling also needs to
11 be in that mix.

12 So before there can be any conversation about
13 proceeding on either a consumer class trial or a TPP class
14 trial, first I think Judge Bumb needs an opportunity to grapple
15 with these issues that she saw as pretty fundamental issues
16 going to the heart of plaintiffs' economic loss theories.

17 And so, respectfully, I don't think that's within the
18 current referral to Your Honor. Although if she wants to refer
19 it, we can certainly brief it to Your Honor. But I think
20 probably in the first instance, this needs to be presented to
21 Judge Bumb to see how she wants to proceed.

22 THE COURT: Yeah. I'm inclined to agree with Greg on
23 this one, Ruben. I was asked to work on getting personal
24 injury bellwether cases to trial. And this goes outside the
25 scope of that particular assignment.

1 MR. HONIK: I certainly understand that, Your Honor.
2 But I think in preparing our submissions for today, it became
3 fairly obvious to us that we're going to have some amount of
4 downtime. And now we know that it's going to be in the order
5 of magnitude of almost a year before we reach a trial. And it
6 just struck us as highly efficient and highly appropriate to
7 give consideration to putting a consumer class trial on the
8 calendar.

9 To state the obvious, the economic loss component of
10 this MDL has an outsized footprint. The numbers are
11 staggering. That's going to have to be dealt with. It's not
12 going to be made to go away if we spend another year and a half
13 doing BI cases. And I don't think we ought to have additional
14 downtime in addition to the six years that we've already
15 arrived at.

16 I don't want to argue with Greg today about some of
17 the things he said. There's not a bit that would involve going
18 back. Presenting a conjoint survey, which is appropriate in a
19 consumer setting, doesn't in any way diminish our idea that the
20 drug is worthless. It just gets to it in a slightly different
21 way.

22 And to state the obvious, the economic experts that
23 we've proffered for the trial that's now been adjourned twice
24 was in support of the TPP damages.

25 And so we do have to submit additional damage expert

1 reports. I agree with Your Honor that the decision likely
2 needs to be made by Judge Bumb, not least because she knows her
3 schedule, but as a purely practical matter, we believe the
4 Court should engage us about putting that on the calendar. And
5 we can certainly roll up our sleeves and get to the bottom of
6 clearing up any damage questions raised by both sides.

7 THE COURT: Well, I like the idea, you know, it
8 resonated with me getting a consumer plaintiffs class to trial.
9 But that's something you have to take up with Judge Bumb.

10 MR. HONIK: Thank you, Your Honor.

11 THE COURT: Is there anything else we need to address
12 today?

13 MR. SLATER: I don't believe so for plaintiffs, Your
14 Honor.

15 THE COURT: Anything else on the defense side?

16 MR. OSTFELD: Your Honor, I'm not aware of anything
17 else for defense. I'll let any of my colleagues speak up if
18 they view this otherwise.

19 THE COURT: All right. Victoria?

20 MS. LOCKARD: Looking through the other agenda items,
21 Judge, I don't think so. I think everything else can probably
22 flow after we know the selection of the bellwether cases to be
23 worked up.

24 THE COURT: That's what I thought as well. I mean, I
25 know there's still a lot more that needs to be fleshed out.

1 But let's get the other bellwether cases selected.

2 Do you disagree, Jessica?

3 (No response.)

4 THE COURT: Very well. All right. Then we'll
5 adjourn.

6 (Court reporter clarification.)

7 MS. DAVIDSON: I'm so sorry. I said I do not
8 disagree. Thank you.

9 THE COURT: Okay. Thank you.

10 All right. We will adjourn for today. I'll issue an
11 order that identifies the other five bellwether cases for
12 trial, in addition to the one that has been identified. I'll
13 confer with Judge Bumb, but tentatively we're looking at the
14 first bellwether trial starting September 2nd, all right.

15 Thank you all very much.

16 MS. LOCKARD: Thank you.

17 MS. DAVIDSON: Thank you, Your Honor.

18 MR. SLATER: Thank you, Your Honor.

19 MR. NIGH: Thank you, Your Honor.

20 (Proceedings concluded at 2:34 p.m.)

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22 **FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE**
23 - - - - -

24 I certify that the foregoing is a correct transcript
25 from the record of proceedings in the above-entitled matter.

1 /S/John J. Kurz, RDR-RMR-CRR-CRC October 23, 2024
2 Court Reporter/Transcriber
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